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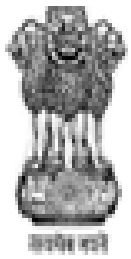

Government of India

MONTHLY AUDIT BULLETIN – MAY, 2014

Directorate General of Audit
Customs & Central Excise
CentralRevenueBuilding,
I.P. Estate
New Delhi-110109

MONTHLY AUDIT BULLETIN – MAY, 2014

CENTRAL EXCISE

(1) GIST OF THE OBJECTION :Non-payment/reversal of Central Excise duty lying in balance on the date of surrender of Central Excise Registration
OBJECTION CODE : IR064
COMMISSIONERATE : Central Excise Commissionerate, Rajkot
CONTRAVENTION OF PROVISION : Sub-rule 2 of rule 11 of the CENVAT Credit Rules, 2004

During the course of audit, it was observed that the final products viz. Barge is declared nil rate of duty w.e.f. 28.02.2013 in the budget of Feb-2013. Therefore, the assessee has surrendered Central Excise Registration on 01.11.2013. The assessee was availing CENVAT Credit on the inputs and there was a balance of Rs. 64,73,540/- in CENVAT Credit Account as on date of surrender of Central Excise Registration i.e. 01.11.2013. The assessee had not paid/reversed the balance lying in balance as on 01.11.2013in terms of sub-rule 2 of rule 11 of the CENVAT Credit Rules, 2004. Therefore, the amount of Rs. 64,73,540/- is required to be recovered from the assessee.

On being pointed out, the assessee agreed with the objection and paid wrongly availed CENVAT Credit Rs. 64,73,540/- vide CENVAT Credit A/s Entry dated 26.03.2014 on the spot.

(2) GIST OF THE OBJECTION : Under valuation of goods by not adding amortised cost of cylinder, supplied by parties, used for printing bags, in assessable value.

OBJECTION CODE : VR090
COMMISSIONERATE : Central Excise Commissionerate, Ahmedabad – III
CONTRAVENTION OF PROVISION : Rule 6 of the Valuation Rules, 2006

During the course of audit, on scrutiny of ledgers, balance sheet and other Central Excise records, it was noticed that the assessee which was engaged in the manufacture of HDPE/PP woven sacks and laminated rolls, used Engraved Cylinders for printing activity. It was noticed that assessee purchased certain cylinders and on inquiry, assessee informed that in some cases, the

customers supply engraved cylinders, the cost of which was not added to assessable value. As per Explanation 1 in Rule 6 of the Valuation Rules, 2000, the cost of moulds, dies supplied for manufacture is required to be added to the assessable value.

Accordingly, the cost to be added on account of amortised cost of cylinders supplied by customers, was ascertained for the years 2012-13 and 2013-14 till September 2013 as Rs. 0.25 p/kg of bags manufactured. Total cost to be added on this account was ascertained as Rs. 859230/- on which Central Excise duty of Rs. 10620/- was payable. The duty of Rs. 10620/-, interest of Rs 8765/- and penalty of Rs. 8765/- was recoverable from the assessee on this account. On being pointed out, the assessee agreed to the objection and paid the total amount involved.

(3) GIST OF THE OBJECTION: Short reversal of Service Tax input credit attributable to exempted excisable goods under clause(iii) (c) of sub-Rule (3A) of Rule 6 of CENVAT Credit Rule 2004

OBJECTION CODE : OR064
COMMISSIONERATE : Central Excise Commissionerate, Bangalore III
CONTRAVENTION OF PROVISION : Rule of Rule 6(3A) (iii) (c) of CENVAT Credit Rule 2004

During the course of audit of Central Excise records, it was observed that the assessee used reverse the Service Tax input credit attributable to exempted goods by following the procedure prescribed under clause (iii) (c) of Sub Rule (3A) of Rule 6 of CENVAT Credit Rule 2004 and adopted calculation method as per Sub Rule (3A) of Rule 6 of CENVAT Credit Rule 2004. While calculating the amount attributable to input Service Tax credit used in or in relation to manufacture of exempted goods, only common input Service Tax credit taken on input services during the financial year was considered instead of total CENVAT Credit taken on input services during the financial year as prescribed under clause (iii) (c) of Sub Rule (3A) of Rule 6 of CENVAT Credit Rule 2004. Hence, assessee had wrongly ascertained the amounts to be reversed for the year 2012-13, and for subsequent period. This resulted in short payment of Rs. 1,77,43,010/- for the year 2012-13 and Rs. 1,63,41,220/- for the year 2013-14 totaling to Rs. 3,40,84,230/- . This amount stands recoverable from the assessee.

(4) GIST OF THE OBJECTION: Wrong Classification Of Pipes
OBJECTION CODE : CR010
COMMISSIONERATE : Central Excise Commissionerate, Coimbatore
CONTRAVENTION OF PROVISION :Rule 6 read with Rule 8 of the Central Excise Rules, 2002

Assessee was engaged in manufacture of HDPE hose pipes (CETH 39172510), water storage tanks (CETH – 39251000) and Drip irrigation pipes and fittings. The assessee was paying excise duty on the first two products. However, they did not pay excise duty on Drip irrigation pipes and fittings claiming classification under Chapter 8424 8100. The assessee used clearing Flat drip Lateral hose pipes and other pipes to various traders like "Good Tech Electricals" claiming classification under Chapter 8424 8100. CETH 8424 is for mechanical appliances (whether hand operated or not) for projecting, disbursing or spraying liquids or powder …., and CETH 84248100 is for Agricultural or horticulture. Hence, if the product is used for Agricultural or horticultural purposes, the tariff rate is "Nil". However, the assessee was selling these pipes to various shops/traders and hence are unable to establish that the end use of such pipes are only for "Agricultural or Horticultural" purposes. The assessee have not entered into any contract with the customers regarding the end use of such pipes for use as "Agricultural or Horticulture" products.

Also such pipes can be classified under 'parts of general use' in view of the expression under Note 2 of Section XVI.

Note 2 of Sec XVI reads as follows:

Subject to Note 1 to this Section, note 1 to Ch. 84 and Note 1 to Ch. 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules :

(a) Parts which are goods included in any of the headings of Chapter 84 or 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8487, 8503, 8522, 8529, 8538 and 8548) <u>are in all cases to be classified in their respective headings;</u>

(b) Other parts , if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8466,

8473, 8503, 8522, 8529 or 8538 as appropriate. However, parts which are equally suitable for use principally with the goods of headings 8517 and 8528 are to be classified in heading 8517;

(c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8487 or 8548.

In view of the above, plastic pipes of general use have to be classified only under Ch. 39. Further, as per the General Interpretative rules for classification 2. 2(a) under the Central Excise Tariff Act.1985:

Since, a complete product in the form of "pipes" has arisen in the present case, the product deserves to be classified under CETH 3917 and therefore assessee was required to pay central excise duty on it. Duty of Rs. 54,11,807/- stands recoverable from the assessee on this account.

On pointing out the same, the assessee have not accepted the audit contention and maintained that such pipes cannot be used elsewhere other than agricultural purpose.

(5) **GIST OF THE OBJECTION : Clandestine manufacture and Removal of Rutile powder without payment of duty**
OBJECTION CODE : CR040
COMMISSIONERATE : Central Excise Commissionerate, Tirunelveli
CONTRAVENTION OF PROVISION :Rule 4,6,8,9,10 & 11 of CER 2002

During the conduct of audit, on scrutiny of records it was detected that the assessee was engaged in clandestine manufacture and clearance of Rutile Powder/ Rutile Titanium. It was also ascertained from the financial records maintained in electronic format that the manufacturer had cleared 389 Mt of Rutile Titanium and rutile powder worth Rs. 1,55,50,000/- for the period 1-4-2013 to 31-1-2014. It appeared that the manufacturer had contravened the provisions of Rule 4,6,8,9,10 & 11 of CER 2002.The duty liability on the goods cleared clandestinely worked out to Rs..19,21,980/-(ED Rs. 18,66,000/- EC Rs. 37320/- and SHEC Rs. 1922/-). The assessee accepted the audit point and has reported to have paid an amount of Rs. 19,21,980/- vide RG 23 A debit entry.

(6) **GIST OF THE OBJECTION : Differential duty payable on account of non-payment of duty under rule 8 of valuation rules, 2000 as required**

OBJECTION CODE : VR110
COMMISSIONERATE : Central Excise Commissionerate, Nashik
CONTRAVENTION OF PROVISION : Section 4 of the Central Excise Act, 1994 read with Rule 8 of valuation rules 2000

The assessee was engaged in the manufacture of Motor Vehicles falling under Chapter 87 of the CETA,1985, and was availing CENVAT Credit facility on inputs, Capital goods and input services. During the course of audit, it was noticed that the assessee was paying duty on its removals to related units in terms of Section 4(1)(a) of Central Excise Act, 1944 i.e on the transaction value and subsequently paying differential duty as per the CAS 4 Certificates on yearly basis. It was detected that the assessee had pay duty from April 2013 on the transaction value on the removals made to their related units whereas the valuation under CAS 4 was available with the assessee for the year ending12-13. As per Section 4 (1)(b) read with Rule 8 of valuation rules 2000 the assessee was required to pay duty only on the CAS 4 valuation and cannot revert back to Valuation under Section 4(1)(a) at the starting of the financial year. The total differential duty on above account was worked out to Rs.98,00,078.00 + 1,96,002.00 (Edu. Cess) + 98,001.00 (H.Edu. Cess) Total Rs. 1,00,94,081.00

(7) **GIST OF THE OBJECTION : Undervaluation of goods resorting to pay the duty on value ascertained as per Section 4(1) (b) of the Central Excise Act though 'sale of goods' was involved**

OBJECTION CODE : VR110
COMMISSIONERATE : Central Excise Commissionerate, Nashik
CONTRAVENTION OF PROVISION : Section 4 of the Central Excise Act, 1994

During the course of Audit, whilegoing through the sales' invoices it was noticed that the assessee engaged in manufacture of Motor Vehicles paid duty on its clearances under Section 4 (1) (b) of Central Excise Act. 1944 read with Rule 8 of Central Excise Valuation Rules, 2000. The goods were assessed under provisional assessment and were finally assessed after finalization of the Balance Sheet. On going through the sales invoices it was noticed that the assessee had cleared its finished goods i.e. Engines to the group companies by paying duty on value

ascertained under CAS 4 but had sold the goods on the transaction value which was on higher side. On going through the Trial balance for 2012-13 it was further evident that the goods were sold to above concerns and it was not a stock transfer. It was also observed that the VAT/State taxes were paid on the transaction value which was clearly evidencing 'sale' of goods. As the goods were sold to the above referred units, the assessee was required to pay duty under Section 4 (1)(a) of Central Excise Act, 1944. The total differential duty on above account for the period 2012-13 and 2013-14(Upto Dec. 2013) was worked out to Rs. 23196661.00+463993.00 (Edu. Cess)+232005.00 (H.Edu. Cess)Total Rs. 23892659.00.

(8) GIST OF THE OBJECTION : Wrong availment CENVAT Credit against additional duty of Customs (CVD) paid on imported coal

OBJECTION CODE : IR060
COMMISSIONERATE : Central Excise Commissionerate, Bhopal
CONTRAVENTION OF PROVISION : Rule 3 of CENVAT Credit Rules read with Notification No. 12/2012, dated 17-3-2012 read with D.O. F.No. B-1/3/2011-TRU, dated 25-3-2011

On scrutiny of the Cenvatable documents of inputs, it was observed that the assessee availedCENVAT Credit on 1% additional duty of Customs (CVD) paid on imported coal .As per section 3 of Customs Tariff Act, 1975, on importation of goods, the additional duty of Customs equal to central excise duty is leviable on like goods produced or manufactured in India. Under Sr no 67 of notification no 12/2012 CE dated 17.3.212 the effective duty on coal was 1% subject to no CENVAT Credit being taken by the user of such goods . When the CENVAT Credit of 1% of excise duty paid on excisable goods was not admissible by the user of the goods, CENVAT Credit of 1% additional duty of Customs would also not be admissible. In para 10 of InstructionD.O. F.No. B-1/3/2011-TRU, dated 25-3-2011it has been clarified that the CVD is levied to provide a level playing field for the domestic manufacturers, CVD is charged at a rate equal to excise duty rate. However, in respect certain items there are two excise duty rates. It needs to be appreciated that if CVD is levied @ 1%, the protection for the domestic manufacturer would be lost since in the country of origin, the overseas supplier enjoys input tax neutralization on goods exported to India (akin to availment of input tax credit), whereas on the other hand the domestic manufacturer suffers all the input taxes and 1% excise duty over and above that. Since 5% excise duty rate is payable when the CENVAT Credit of duties and taxes paid on inputs and input services is availed

of, the tax treatment becomes equitable with the goods being imported into India, the input taxes having been neutralized in the country of export. The CVD of 5% will be applicable in respect of all the goods covered under Notification 1/2011-C.E., dated 1-3-2011 and 1% rate will not apply. Hence, it is clear from the afore-said instructions that CVD of 5% will be applicable in respect of all the goods, which is chargeable to excise duty at two rates, one normal rate and other concessional with a condition that no CENVAT Credit has been taken, to provide a level playing field for the domestic manufacturers. CENVAT Credit of CVD paid of 5% would be available.

From the above it was very much clear that CENVAT Credit taken on 1% additional duty of Customs paid on imported coal was not admissible. When the matter was discussed, the assessee replied that restriction of availment of CENVAT Credit of 1% excise duty on indigenous coal and not on 1% additional duty of Customs. The reply of the assessee appears to be not tenable as CENVAT Credit of 1% of excise duty paid on excisable goods is not admissible by the user of the goods and hence CENVAT Credit of 1% additional duty of Customs(CVD) which is equal to excise duty will also be not admissible. The CENVAT Credit wrongly taken worked out to the tune of Rs.16694922/-. Which stands recoverable from the assessee.

(9) GIST OF THE OBJECTION : Irregular availment of exemption notification
OBJECTION CODE : CR030
COMMISSIONERATE : Central Excise Commissionerate, Kolkata-III
CONTRAVENTION OF PROVISION : Rule 6 read with Rule 8 of the Central Excise Rules, 2002

During the course of audit it was observed that the assessee, availing the benefit under Sl. No. 336 to the Notification No. 12/2012-CE dated 17.03.2012, removed their finished products, viz. Cable Rack Assembly, Cable Tray & Accessories, GI Flats, etc. falling under Sub-heading Nos. 72112910 & 73089090 of the First Schedule to the Central Excise Tariff Act, 1985 without payment of Central Excise Duty. It was observed by the auditors that the said notification is conditional and the assessee had not fulfilled condition No. 41 of the said notification as the goods supplied by them were not exempted from duties of Customs under First Schedule to the Customs Tariff Act, 1975 when imported into India according to Customs Notification No. 21/2002-Cus dated 01.03.2002 as no specific purpose of importation had been mentioned under Condition No. 41 of the Notification. Moreover, scrutiny of Purchase Orders and Certificates from Project Authorities revealed that the subject orders had not been procured by them. Actually the subject contract was awarded to another unit of the assessee. So, they were not entitled to

avail the benefit under Notification No. 12/2012-CE dated 17.03.2012. Accordingly, the assessee is liable to pay Excise Duty to the tune of Rs. 17,68,518/- (including Education Cess& SHE Cess) along with appropriate Interest in terms of provision under Section 11A and 11AA of Central Excise Act, 1944.

(10) GIST OF THE OBJECTION : Irregular availment of CENVAT Credit
OBJECTION CODE : IR011
COMMISSIONERATE : Central Excise Commissionerate, Kolkata-VI
CONTRAVENTION OF PROVISION : Rule 6 read with Rule 8 of the Central Excise Rules, 2002

The assessee is engaged in manufacturing of aerated water. The said assessee had also manufactured and sold syrup (TSH21069040) of Coke, Fanta, Sprite, etc. to various customers. The latter use this syrup as input to dispense aerated water (TSH22021010) through vending machine (fountain soda). This activity is exempted from payment of duty. However, in course of dispensation of aerated water, the customers of the assessee availed the services of various service providers for marketing their product. Such services availed by customers are billed on the assessee and the assessee availed input service credit on such services provided to their customers. The said services used by the customers were not the input services of the assessee and as such the input Service Taxcredit availed by the assessee was irregular & inadmissible. The assessee is, therefore, required to reverse CENVAT Credit of Rs. 1,12,923.00 involved along with interest.

SERVICE TAX

(11) GIST OF OBJECTION : Wrong availment of CENVAT Credit on Plant and Machinery at site and attached to earth
OBJECTION CODE : SSR04
COMMISSIONERATE : Central Excise Commissionerate, Mangalore
CONTRAVENTION OF PROVISION : Rule 3 of the CENVAT Credit Rules, 2004 read with circular F.No.154/26/99 –CX-4 dated 15.01.2002

During the course of audit it was noticed that as per the terms and conditions of the agreement for setting up of different turnkey projects within the assessee's premises, the contractor was to construct the said plants, and the scope of work included aspects like designing, planning, engineering, procurement, manufacturing and supply of plant and equipment, and necessary commissioning spares, construction, site, all piping and fittings, integration and commissioning of all aspects of the plant, all civil and structural work etc. on Lump Sum Turnkey(LSTK) basis. The agreement further stated that the contractor should be completely responsible to construct and set up the complete system on Turnkey basis. The Turnkey projects were given to M/s L&T, M/s Engineers India Ltd., M/s Driplex Water Engineering Ltd. etc. for setting up of Diesel Hydro Treating Unit, Polypropylene Unit, DM Plant & CDU plant package etc. inside the premises of M/s MRPL under turnkey project.

The CBEC vide circular no.F.No.154/26/99 –CX-4 dated 15.01.2002 has clarified about plant and machinery assembled at site that no CENVAT Credit is eligible on the machinery, components or other goods involved in the construction and setting up of the same as specified under Rule 6(1) of the CENVAT Credit Rules,2004. Hence the assessee was not eligible to claim credit of duty paid on inputs used for manufacture of capital assets which were being embedded to earth which worked out to ` 88,07,28,648/- .

(12) GIST OF OBJECTION : Availment of CENVAT Credit against improper records
OBJECTION CODE : SSR01
COMMISSIONERATE : Central Excise Commissionerate, Mangalore
CONTRAVENTION OF PROVISION : Rule 3 read with Rule 9 of the CENVAT Credit Rules, 2004

On verification of records it was noticed that assessee was availing CENVAT Credit based on daily transaction reports provided by NFS online (National Financial Switch).

Assessee, a financial institution (Bank) collects, from its customers, Rs.20 per transaction, both for financial and non-financial transactions done in other Bank's ATM. When assessee's Bank customer use ATM services of other bank, the bank debits the customer's account by ATM charges along with Service Tax and passes on to NFS to pay to other bank for providing ATM services to their customers. Assessee in turn availed credit on that part of Service Tax which was passed on to other bank for providing service.

Since the details were down loaded from the internet of NFS site, which is not a prescribed document to avail credit As required under CENVAT Credit Rules,2004, and also there was no evidence for having paid Service Tax to the Government exchequer, assessee was not eligible to take credit of Rs.1,19,12,502/- lakhs on the said transactions. The assessee is required to pay the CENVAT Credit alongwith interest and penalty due on the date of payment.

(13) GIST OF OBJECTION: Non-payment of Service Tax in respect of service charges paid to Directors of the company under reverse charge mechanism

OBJECTION CODE : OSR03

COMMISSIONERATE: Central Excise Commissionerate, Belgaum

CONTRAVENTION OF PROVISION : Section 66 read with Section 68 of the Finance Act, 1994

During the course of audit, it is noticed from the financial statements for the period from 2011-12 and 2012-13 that the assessee had paid service charges (declared as 'remuneration') to the Managing Director and Joint Managing Director. These directors were also holding similar positions in the related/sister companies. From the ledgers for the years 2012-13 and 2013-14 submitted by the assessee, it was noticed that they had paid service charges of Rs. 5,14,50,000/- to the said directors. The above services are chargeable to Service Tax in the hands of the company in view of introduction of reverse charge mechanism with effect from 01.07.2012 vide Notification No. 30/2012-ST dated 20.06.2012 as amended. Service Tax of Rs.63,59,220/- stands recoverable on the above service charges paid by the assessee unit.

(14) GIST OF OBJECTION : Non-payment of Service Tax on the "Sales Commission paid to the Non-Executive Directors"

OBJECTION CODE : OSR03

COMMISSIONERATE : Central Excise Commissionerate, Coimbatore

CONTRAVENTION OF PROVISION : Section 66 and 68 of the Finance Act, 1994 read with Notification No.30/2012-ST dated 20.06.12 as amended

Scrutiny of the consolidated Balance Sheet of the assessee showed that the Company had paid Sales Commission to its non-executive directors as detailed in the Annexure-II, to the Balance Sheet.

As per Notification No.30/2012-ST dated 20.06.12 as amended by Notification No.45/2012-Service Tax dated 07th August, 2012, 100% of Service Tax is payable by *the person receiving service (in respect service rendered by the non-executive directors of the company) for the commissions paid to its non-executive directors.*

Hence, the assessee was liable to pay Service Tax of Rs.9,13,418/- [Service Tax Rs.8,86,814/- Ed. Cess Rs.17,736/- and S&H Cess Rs.8868/- along with appropriate interest against said services received by it. On being pointed out the assessee accepted the contention of audit and paid the above amount.

(15) GIST OF THE OBJECTION : Wrong claim of services as 'export of Service' though consumed in India

OBJECTION CODE : CSR04

COMMISSIONERATE : Service Tax - I Commissionerate, Mumbai

CONTRAVENTION OF PROVISION : Section 66 and 68 of the Finance Act read with Export of Services Rules, 2005

The assessee was providing services to, group entities situated outside of India in relation to investment advisory services, research services and sub advisory services.

The Investment Advisory Services / Research Services/sub advisory services provided by the assessee appeared to be based on their research on Indian listed Companies and meant for advising them for investment decision in such Indian Companies. In other words, the benefit of

the service that is claimed to have been exported has not accrued outside India. It is noticed that the above referred activities are classifiable under the category of Banking and Financial Service.

As per CBEC Circular No 141/10/2011 TRU dated 13.05.2011 it has been clarified that the scope of term 'used outside India' would not cover the situation where services are used in respect of a project or activity in India. Hence in this case also, as the Investment Advisory Services / Research Services/sub advisory services were meant for investment in stock market of India/ Indian companies, hence these would not be covered as Export.

As per Notification No. 2/2007-ST dated 01.03. 2007 the provision of any taxable service under Rule 3(2) shall be treated as export of service when the following conditions are satisfied, namely:-

(a) such service is provided from India and used outside India; and

(b) payment for such service provided outside India is received by the service provider in convertible foreign exchange.

Hence as per Rule 3(2)(a) of Export of Service Rules, 2005, prior to 01.03.2007, a condition to qualify as export is that :-

" Such service is delivered outside India and used outside India".

Further from 01.03.2007, the following condition was prescribed;

" such service provided from India and used outside India".

In view of above it is seen that the condition of Rule 3(2)(a) of Export of Service Rules, 2005, is NOT satisfied in the instant case, since the services provided were delivered / used within India, thus NOT qualifying as Export. Hence the services are not entitled to get the benefit of export. In fact the effective use of such services i.e. Investment Advisory Services were meant for investment in Indian companies only and these were used within India and cannot be qualified as export. Therefore the services provided by them do not qualify as Export of service, and liable to pay Service Tax on the services provided. The assessee is liable to pay the same along with interest.

It was observed from the ST-3 Returns that during the period from 01.04.2008 to 26.02.2010, the assessee had declared such services worth Rs. 415093174/- & Rs. 430137302/- claiming as export of export. Thus assessee is liable to pay Service Tax of Rs. 95609658/- involved.

(16) GIST OF THE OBJECTION : Wrong classification of service provided to the Foreign Institutional Investors (FIIs) under Stock Broker Service as 'non-taxable'

OBJECTION CODE : CSR01
COMMISSIONERATE : Service Tax - I Commissionerate, Mumbai
CONTRAVENTION OF PROVISION : Section 66 and 68 of the Finance Act read with Rule 4(a) of the Place of Provision Rules, 2012

On verification of the ST3 return for the period July 2012 to March, 2013, it was observed that the assessee had claimed the services provided under 'Stock Broking service' as non-taxable service amounting to Rs. 1,18,05,70,652/-. The assessee was doing stock broking business for Foreign Institutional Investors situated outside India through BSE/NSE. For such services, the place of provision is taxable territory by virtue of Rule 4(a) of the Place of Provision Rules, 2012, and therefore the services provided by the assessee could not be considered as non-taxable service. Thus assessee is required to pay the Service Tax liability for the period July, 2012 to March, 2013, ascertained as Rs. 14,59,18,533/-.

(17) GIST OF THE OBJECTION: Non payment of Service Tax on expenditure incurred by H.O of the assessee situated outside of India but having Project Office in India

OBJECTION CODE : VSR01
COMMISSIONERATE : Service Tax Commissionerate, Delhi
CONTRAVENTION OF PROVISION : Section 66 and 68 read with Section 66 A of the Finance Act, 1994

During audit, it was observed that the assessee providing Construction of Industrial and Commercial Complex, had shown expenditure in foreign currency in their balance sheets during 2008-09 to 2013-13. On enquiry, the assessee explained that these expenditure was incurred by their Head Office located in Japan towards design assistance, technical assistance/consultancy and other business support activities such as misc. structural works, courier, business trip, etc. provided by Head Office towards construction projects in India. The assessee further stated that their H.O. raised debit notes towards expenses incurred by them in Japan and they booked these expenses in their books on the basis of debit notes by crediting H.O. In the instant case, assessee, a foreign concern was carrying on business through permanent establishment in India as Project Office and they provided services such as design, technical assistance/consultancy, other business

support such as misc. structural works, courier, business trip etc. from their Head Office located in Japan towards their construction projects in India. Therefore as per Section 66A(2) operating Project Office in India and H.O. of the company situated outside of India should be treated as separate persons and assessee having permanent establishment in India was liable to pay Service Tax on expenditure incurred by their Head Office under reverse charge mechanism. During 2008-09 to 2012-13, total expenditure in foreign currency worked out to Rs. 16,44,16,496/- on which Service Tax of Rs. 1,81,00,074/- + interest was recoverable from them.

(18) GIST OF THE OBJECTION: Difference observed in tax due and tax deposited.
OBJECTION CODE : VSR06
COMMISSIONERATE : Service Tax Commissionerate, Delhi
CONTRAVENTION OF PROVISION : Section 66 and 68 of the Finance Act, 1994

The assessee was engaged in construction of residential complex and works contracts services. During the reconciliation from various statutory records, a difference in tax due and tax deposited (at times collected since on accrual basis) was observed. Further enquiry revealed that the assessee did not file their ST-3 returns for the period 2011-12(Oct-Mar) & 2012-13 and in turn did not deposit the tax due. The assessee informed that after receiving the letter of audit they realised their liability and opted VCES Scheme and deposited an amount of Rs.43,52,007/-. But the audit team further worked out the detailed tax liability and found that a liability to the tune of Rs.28,89,525/- and interest thereon Rs.12,13,287/- totalling Rs.41,02,812/- was still due against the assessee. On being pointed out the assessee agreed and undertook that the same will be deposited within Ten days.

(19) GIST OF THE OBJECTION: Sale of support, maintenance and other technical support services in respect of licensed software developed by their parental company without payment of Service Tax
OBJECTION CODE : VSR08
COMMISSIONERATE : Service Tax Commissionerate, Delhi
CONTRAVENTION OF PROVISION : Section 66 and 68 of the Finance Act, 1994

The assessee was mainly engaged in Maintenance and Repair Services, Consulting Engineer Services, Commercial Coaching and Training, Software Development, ITSS and

Product Development Services. During the course of audit, the assessee was found indulged in providing selling, support, maintenance, and other technical support services in respect of licensed software developed by their parental foreign company by down loading the same from the exclusive portal of parent company and converting the same in physical form like Compact Discs (CD) and other physical tool like Dongle with the name 'Asset" and 'CONNECT'. The assessee used to sell this software to their customers in Indian Territory. The conversion of such software in the physical form appeared to fall under the 'Information Technology Software Services' as defined under Section 65(105) (zzzze) read with Section 65(53a) of the Finance Act, 1994, Section 65(53a) and 65(105)(zzzze) of the Finance Act, 1994 which read as :

(a) *'Adaptation up gradation, enhancement, implementation and other similar services related to information technology software.'*

Board also vide DOF No. 334/1/2008-TRU date 29.02.2008 has clarified the issue that information technology (IT) software service includes:

'IT software for commercial exploitation including right to reproduce distribute and sell IT software supplied electronically.

4.1.1 Software consists of carrier medium such as CD floppy and coded data software are categorized as 'normal software and 'specific software Normalized software is mass market product generally available in packaged form of the shelf in retail outlets. Specific software is tailored to specific requirement of the customer and is known as customized software.

4.1.2 Software and upgrades of software are also supplied electronically, known as digital delivery. Taxation is to be neutral and should not depend on forms of delivery. Such supply of IT software electronically shall be covered within the scope of the proposed service.'

The agreement between the assessee and their parental company dated 23rdOctober, 2008 was also examined. A write up submitted by the assessee elaborated that the software was downloaded from the exclusive Portal named 'Aircom Assist' and copied to a physical media. The assessee in fact defined the entire process and elaborated the details of these licensed software in their technical write up. Besides defining the software 'Asset' and 'Connect' the assessee also submitted steps for delivery in the following words which are self-explanatory from tax point of view as;

(1) PO received from the customer.

(2) Tool downloaded from the portal 'Aircom Assist' and copied to a physical media CD

(3) CD is shipped to the customer premises.

(4) License programmed on the licensing portal referring to the PO by AIRCOM licensing team.

(5) Remote session initiated by end user for tool installation and license activation.

(6) Delivery signoff taken.

The sample copies of sale invoices were procured which showed that the assessee had been selling the named software to their customers against consideration and not paying any Service Tax. However, the CST/VAT was shown to have been paid. The corresponding purchase orders were also obtained which shows that besides the supply of software tool even a clear cut taxable activity like the installation and commission was also being carried out by the assessee. In case the PO placed by one of the customers clearly mentioned that the Excise Duty was inclusive of the value but no such payment of any Excise duty was reported.

As per the details submitted by the assessee on 07.01.14, they collected an amount of Rs. 9,34,53,563/- against such software sale attracting Service Tax to the tune of Rs. 1,02,23,690/- Education Cess Rs. 2,04,474/- and Higher Education Cess Rs. 1,02,237/- totalling Rs. 1,05,30,401/- (One Crore Five Lacs Thirty Thousand Four Hundred and One only). The said amount stands recoverable from the assessee.

(20) GIST OF OBJECTION: Non payment of Service Tax on 'Consulting Engineer Service' imported from China.

OBJECTION CODE: OSR03

COMMISSIONERATE : Central Excise Commissionerate, Rajkot

CONTRAVENTION OF PROVISION : Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994

During the course of audit, scrutiny of balance sheet for the year 2012-13 indicated that the assessee had made some payment to their foreign based service provider , China amounting to Rs. 10,87,78,600/- (in convertible foreign currency, USD). The said payment was shown in Balance Sheet as "Consulting Engineer Expenses".

Further, verification of the said payments with relevant ledger account and spot enquiry made with the assessee revealed that the said expenses were incurred by them for availing services under the category of "Consulting Engineer" for erection of boiler, turbine and generator and for the testing and commissioning of the facility for 1200 MW . The said services are actually being consumed by the assessee in India only. They further added that book adjustment for reimbursement or actual payment thereof in favour of said service provider company was pending. However, in terms of Rule 3 of Point of Taxation Rules, 2011 the assessee was liable to pay the Service Tax liability on issuance of invoice.

In view thereof, the said assessee was liable to pay Service Tax on the gross amount of expenses incurred towards services received by them from their overseas service provider under the category of "Consulting Engineer Service" under Section 65(105)(g) of the Finance Act, 1994. Further, the service provider was informed to be located outside India without having any office in India. Therefore, the assessee is required to pay Service Tax on the said charges payable to the overseas service provider against availing Consulting Engineering Services as per provisions of Section 66A of the Finance Act, 1994 read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994 and Rule 3(iii) of the Taxation of Services (provided from outside India and received in India) Rule, 2006'.

On being pointed out, the assessee agreed and paid the Service Tax amounting to Rs. 1,34,45,035/- on the gross amount of invoice Rs. 10,87,78,600/- along with interest thereof amounting to Rs. 23,33,911/- through E-payment vide Challan No. 00209 dated 18.03.2014.